

CALIFORNIA FRANCHISE TAX BOARD

Legal Ruling No. 381

March 4, 1975

DELINQUENCY PENALTIES ON ADDITIONAL TAX ASSESSED ON AUDIT

Syllabus:

In some instances a taxpayer, having prepaid income or franchise tax by estimated tax payments or by withholding, will file, without reasonable cause, a delinquent return. On its face the return shows tax fully paid. Subsequently, an audit reveals that the taxpayer is subject to a deficiency.

The following question is presented:

Where a delinquent return is filed showing an overpayment or tax fully paid, but upon subsequent audit a deficiency is assessed, should the late filing penalty be added to the deficiency?

Decision:

Yes.

Discussion:

The failure to file penalty provisions are set out in Revenue and Taxation Code §§ 18681 and 25931, and are patterned after similar provisions in Internal Revenue Code § 6651. Section 6651 is quite specific in stating that the penalty is based upon "the amount of tax required to be shown on the return." The same language appears in Revenue and Taxation Code §§ 18681(b) and 25931.3 which provide for offset of amounts previously paid before computing the penalty.

The Franchise Tax Board has adopted the concept of basing the delinquency penalty on the "total correct tax." This concept was promulgated in Plunkett v. Commissioner, 118 Fed.2d 644 (CA 1, 1941) and in American Milk Products Corp. v. U.S., 41 Fed.2d 966 (Ct.Cl. 1930), although in those cases no credit was provided for any tax prepaid. The current statute imposes the penalty upon the correct net tax due on the proper filing date (26 CFR, § 301.6651-1(f)).

The taxpayer has an affirmative duty to file a timely return, showing the correct tax due, in each year. Where he fails to do so, in the absence of reasonable cause, the penalty, based upon correct net tax due, will lie. See C.V.L. Corp. v. Commissioner, 17 T.C. 812 (1951).